BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit has not yet appeared in the Federal Reporter. It was handed down March 17, 1941, and is on pages 130 to 138 of the record. The decision of the United States District Court for the District of Massachusetts (Sweeney, J., April 9, 1940) is on page 12 of the record.

Jurisdiction.

Jurisdiction of the United States District Court is founded upon diversity of citizenship. Each of the partners in the plaintiffs' firm is a citizen of a state other than Massachusetts (R. 2). By stipulation filed in the Circuit Court of Appeals for the First Circuit, pursuant to 28 U.S.C. section 399, it appears that at all times involved in the litigation all of the trustees and all of the shareholders in the defendant trust have been residents of Worcester, Massachusetts (R. 130). The case involves more than $3000 exclusive of interest or costs (R. 3).

The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals for the First Circuit is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, chapter 229, 43 Stat. 936, 938-939.

Statement of the Case.

The case is stated in the petition (*ante*, pp. 1-3).

Specification of Errors.

The issues presented are stated in the petition (*ante*, p. 4).

Summary of Argument.

I. The holding of the Circuit Court of Appeals for the First Circuit that the trust could be bound on speculative contracts was error and is in conflict with the decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts, and with decisions of the United States District Court of Georgia, and of the United States District Court for the District of Massachusetts.

II. The holding of the Circuit Court of Appeals for the First Circuit that ratification by the co-trustees of the acts of one trustee could be inferred was error, and conflicts with decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts and the decision of the United States District Court for the District of Massachusetts.

Argument.

I. The defendant trust is not liable on speculative contracts, under the decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts.

A. The contracts entered into were speculative or wagering contracts.

The obligation upon which recovery is sought by the plaintiffs is the balance due upon a margin account covering alleged purchases and sales of contracts for the future delivery of hides. It is to be observed that actual deliveries were never made to anyone, but profit or loss was determined by striking a balance at certain intervals.

Transcript of Record, pp. 43 and 44.

The trustee who, it is alleged, acted in behalf of the trust never intended to receive actual delivery of the hides, and

that was the understanding with Mr. McCarthy, commodity salesman representing the plaintiffs.

Transcript of Record, p. 82.

The trust was not engaged in the actual purchase and sale of hides, but incidental to its slaughtering business would have approximately 1000 hides a year for sale. It had these only as a by-product of its principal business of dealing in meat.

Transcript of Record, p. 77.

The quantities involved in the contracts with the plaintiffs were in fact about thirty-five to forty times greater than the average number of hides the defendant would normally have on hand in consequence of its slaughtering business. This was testified to by the plaintiffs' witness Daly. *In other words, a single purchase of a single futures contract in smallest quantity dealt with on the exchange involved the same quantity of hides which the defendant trust would normally accumulate in one year.*

Transcript of Record, p. 46.

The record is replete with evidence that the transactions were carried out on margin accounts for speculation and that variations occur hourly and daily on the commodity market.

Frank P. Daly testified as follows:

> "We either pay or draw a draft on them [clearing associations] for the money that may be due us and in connection with this contract at the time it is made, we make a cash deposit with the clearing house association and if the contract varies from day to day, we would

continue to advance our moneys to keep the contract good with the clearing house to the market price."

Transcript of the Record, p. 33.

Mr. McCarthy testified as follows:

"On the following Tuesday, I called him on the telephone and said, 'I want $4000. for your margin requirements' and while I was talking with him on the telephone, the market dropped again and I requested $6000. in margin requirements at the end during the same conversation, so that while we were talking on the telephone, the market had dropped so that we required not $4,000. but $6,000."

Transcript of the Record, p. 64.

The Circuit Court of Appeals for the First Circuit acknowledges the speculative nature of these contracts when it states in the opinion rendered in this case:

"It is certainly true that trustees of the conventional type of nonbusiness trust will not ordinarily be permitted to invest in anything so speculative as futures contracts."

Transcript of the Record, p. 136

Where, as here, the intention of the trustee, who purported to act on behalf of the trust, was never to receive actual delivery of the hides, where the purchases and sales of contracts were made on margin accounts, where there were substantial fluctuations in the price on the market during the course of a telephone conversation, and where the purchase and sale of hides was not a part of the trust business, it is apparent that the contracts were entered into

solely with speculative intent as pure betting or wagering transactions. It might fairly be said that Eli Jacobson was gambling with trust funds.

B. Speculative contracts of the nature sued upon are not within the purposes of the trust and are not binding upon it.

The purposes of the trust as set forth in its declaration filed with the Department of Corporations and Taxation provided:

> ". . . Its purpose is to buy, sell, import and export live stock of all kinds and to deal in meats and meat products in all its branches, to erect abattoirs, cold storage warehouses, slaughter houses, packing houses and other structures necessary for its business, to slaughter live stock of all kinds, and deal generally in hides and all other animal products; particularly to carry on the business formerly conducted in the cities of Worcester and Clinton, Massachusetts under the name of M. Jacobson & Sons . . ."

That the powers of the trustees to do any act are restricted to those granted in the declaration of trust is elementary and has been accepted almost without discussion in the cases.

Bremer v. *Hadley,* 196 Mass. 217.
Downey Co. v. *Whistler et al.,* 284 Mass. 461.
Ashley v. *Winkley,* 209 Mass. 509, at 527.

And it is well established that the trust instrument is to be construed strictly, resolving all doubts toward the protection of the *cestuis que trust* or beneficiaries.

Greco v. *Hubbard et als.,* 252 Mass. 37, at 43.

Dumaine v. *Dumaine*, 301 Mass. 214.
Tuttle v. *The First National Bank of Greenfield*, 187 Mass. 533.

In commenting upon the construction of a trust instrument in *Dumaine* v. *Dumaine* (*supra*) the Court said at page 222:

> "It is not for the Court to read into a trust instrument provisions which do not expressly appear or which do not arise by implication from the plain meaning of the words used."

And again at page 218:

> "And in making this determination, we must be guided by the well known principle of law that the whole instrument is to be considered, aided by the surrounding circumstances, due weight being given to all its language, with some meaning being given, if possible, to all parts, expressions and words used, discarding and disregarding no parts as meaningless, if any meaning can be given them consistently with the rest of the instrument."

It is to be observed that the declaration of trust in the case at bar provided that its purpose was ". . . particularly to carry on the business formerly conducted in the cities of Worcester and Clinton, Massachusetts under the name of M. Jacobson & Sons . . . ," which was the slaughter of live stock, purchase and sale of meat.

In *Tuttle* v. *The First National Bank of Greenfield* (*supra*) the trustee was directed to invest in property "according to his best judgment and direction . . . with full power to change any investment at his discretion." He pledged cer-

tain trust stock as collateral for a loan on a promissory note which he signed as trustee, the proceeds of which were expended for purposes for which the income lawfully could have been appropriated. The Court held that the bank acquired no title to the stock, saying:

> "But this power did not clothe him with authority to pledge any part of the fund as security for the payment of a promissory note made by him as trustee although the money received went into the trust funds, and was expended for purposes for which the income lawfully could have been appropriated."

Speculation has never been held to be within the powers of a trustee. As stated by Professor Scott in his treatise on the law of trusts:

> "On the other hand, certain kinds of investments are universally condemned. It is improper for a trustee to purchase securities for speculation. Although the line between what constitutes speculation and what constitutes a business man's risk and what constitutes a prudent investment is drawn in different places by different courts. It is clear, of course, that a trustee cannot properly purchase securities on margin; nor can he properly purchase speculative shares of stock; or bonds selling at a large discount because of the uncertainty as to whether they will be paid at maturity."
>
> Scott on Trusts, volume 2, page 1206, section 227.6.

The Circuit Court of Appeals for the First Circuit acknowledges that the rule is as stated in Professor Scott's treatise, but it is stated in the opinion that strict construction of trust instruments is not applicable to "business

trusts of the type considered here," and that the trust "instrument should be considered as analogous to a corporate charter and as broadly interpreted."

Transcript of Record, p. 137

There is no citation of authority by the Circuit Court of Appeals for the First Circuit for that proposition of law, and it is respectfully submitted that it is not sound, and is contrary to the adjudicated cases in Massachusetts.

Downey Co. v. *Whistler,* 284 Mass. 461.
Horowitz v. *State Street Trust,* 283 Mass. 53.
Downey Co. v. *282 Beacon Street Trust,* 292 Mass. 175.

The cases cited above involved trusts organized for the purpose of conducting realty businesses. The rules governing trusts generally were carried over and strictly applied in those cases, and certainly there is no sound reason for a distinction between a realty business and meat business.

After ruling that the trust instrument involved in the case at bar should be interpreted in accordance with the rules governing corporate charters, the Circuit Court of Appeals holds that the transactions involved were within the powers of the trustees. In support of that statement the Court has cited *Scandinavian Import-Export Co.* v. *Bachman,* 195 App. Div. 297; *Lamson Bros. & Co.* v. *Turner,* 277 Fed. 680 (C.C.A. 8, 1921); and *Clark* v. *Murphy,* 142 Kans. 426 (R. 137). The cases cited are not applicable to the case at bar because, first, they are concerned with corporations and corporate charters, and secondly, the decisions are based upon different facts from those presented here.

The case of *Scandinavian Import-Export Co.* v. *Bachman,* 195 App. Div. 297, involved a corporation that was expressly

granted the power to purchase securities, and was otherwise given comprehensive powers under which it could embark in any lawful business in any place within the jurisdiction of the United States and in foreign countries. It further appeared the only business in which it engaged was that involved in the litigation. The Court acknowledged in that case that the rule would be different with respect to trusts, saying, at page 304:

> "It is, of course, well settled that a trustee may not speculate with trust funds . . ."

In *Lamson Bros. & Co.* v. *Turner,* 277 Fed. 680 (C.C.A. 8, 1921), the question before the Court was whether the contracts for the purchase and sale of futures entered into by the corporation were wagers, and hence illegal contracts. It was there held that the particular contracts before that Court were not illegal. That issue is not argued here in support of the petition to grant a writ of certiorari.

In *Clark* v. *Murphy,* 142 Kans. 426, the corporation in question was organized "to engage in buying, selling, and handling grain, feed, fuel, supplies, and produce, and engaging in all kinds of business usually carried on by farmers' elevator and supply companies." It was there held that *elevator* companies usually engaged in transactions involving futures contracts.

The Court has referred to the case of *In re Trion Mfg. Co.,* 214 Fed. 161 (D.C. N.D. Ga.), in which the powers conferred upon the corporation were analogous to those granted the defendant trust, and it was there held that, even though the purchase and sale of cotton was within the powers of the corporation, speculation in cotton futures was clearly *ultra vires,* the Court saying:

> "This record shows, however, and I think conclusively that Mr. Hamilton was trading in the name of the Trion

> Manufacturing Company, that is, buying and selling cotton futures as a mere matter of speculation, which, in my opinion he could not legally do. The Corporation could not be bound by any such acts of his as are shown here. These acts were clearly *ultra vires.* No power is shown in the charter to authorize the corporation to go into such business. It was a corporation to manufacture cotton goods. *While the power is given to buy and sell cotton, this could not carry with it the implication that it was authorized to speculate in cotton.*" (Italics ours.)

It is respectfully submitted that the holding of the Circuit Court of Appeals for the First Circuit that the trustees of the defendant trust had power to engage in speculative transactions is in conflict with the decisions of the Supreme Judicial Court of Massachusetts and the United States District Courts.

II. THE HOLDING OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT THAT THERE WAS UNANIMITY OF ACTION AMONG THE TRUSTEES BY RATIFICATION IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The contracts which form the basis of this litigation were entered into by Eli Jacobson, one of three trustees of the defendant trust, and the plaintiffs. The Circuit Court of Appeals for the First Circuit has assumed that "Eli Jacobson in his dealings with the plaintiff firm could not bind the trust without the concurrence, in some form, of his cotrustees."

Transcript of Record, p. 135

The decisions in Massachusetts so hold.

> *Horowitz* v. *State Street Trust Co.*, 283 Mass. 53.
> *Downey Co.* v. *282 Beacon Street Trust*, 292 Mass. 175.

And that is the universal rule.

> Scott on Trusts, volume 1, page 55, section 6.3; volume 2, page 1053, section 194.

The Circuit Court of Appeals for the First Circuit then asserts that "unanimity can be achieved by subsequent ratification of the acts of a single trustee," and that "such ratification may be inferred from knowledge of a course of dealing and failure to object to it."

> Transcript of Record, p. 35

It is respectfully submitted that there was no valid ratification of the acts of Eli Jacobson in the case at bar.

> *Downey Co.* v. *Whistler*, 284 Mass. 461.
> *Boston* v. *Robbins*, 126 Mass. 384.
> *Loughery* v. *Bright*, 267 Mass. 584.

The case of *Downey Co.* v. *Whistler* (*supra*) deals at length with the authority of trustees of a business trust. The trust instrument in that case was a matter of public record as in the case at bar, and the Court there held that there could be no ratification of the acts of a trustee by a co-trustee, saying, at page 465:

> "From this provision it is clear that Henderson, acting alone, had no power or authority to bind the trust, and as the plaintiff had at least constructive notice of

the terms of the trust, it follows that it knew that Henderson alone had no power to bind the trust. The other trustee, Roger B. Tyler, did not learn of the contract until long after the contract was completed. He, therefore, could not be held to have ratified, if he legally could, the contract between the plaintiff and the trust by Elliott Henderson, trustee."

So, in the case at bar, there was no affirmative evidence that Nathan Jacobson, one of the trustees, had any knowledge of the contracts until after they were completed.

The only direct evidence as to knowledge on the part of the other trustees came from Eli Jacobson, and it appeared that Nathan Jacobson did not know about the contracts at the time of the trial in the United States District Court.

Transcript of Record, p. 76.

There being no affirmative evidence of knowledge or ratification by Nathan Jacobson, no inference can be drawn from his failure to testify as stated by the Circuit Court of Appeals for the First Circuit.

Poirier v. *Terceiro,* 224 Mass. 435.

The case of *Howe* v. *Howe,* 199 Mass. 598, cited by the Circuit Court of Appeals for the First Circuit, is inapplicable, since in that case there was affirmative evidence to be met by an available witness.

It appears that Eli Jacobson intended these transactions to be his own, and the defendant's name was used merely because margin sales would not be made on his own credit. This is manifested by the heading of the bookkeeping account: "Eli Jacobson—E. A. Pierce & Company."

Transcript of Record, p. 51.

The above account would also serve to forestall any knowledge on the part of the other trustees that Eli Jacobson had contracted with the plaintiffs in behalf of the defendant trust.

It likewise appears that none of these transactions would be apparent by an examination of the profit and loss statements.

Transcript of Record, p. 79.

Furthermore, it is not likely that the co-trustees would ratify these contracts, even if they could do so, at a time when it was apparent that Eli Jacobson had sustained substantial losses.

The cases of *Rand* v. *Farquhar,* 226 Mass. 91, and *Bowen* v. *Farley,* 256 Mass. 19, cited by the Circuit Court of Appeals for the First Circuit, were actions enforcing liability of a trustee not in his representative capacity, and are inapplicable here.

The case of *Horgan* v. *Morgan,* 233 Mass. 381, cited by the Circuit Court of Appeals for the First Circuit in support of its statement that ratification may be inferred "from knowledge of a course of dealing and failure to object to it," was an action against co-partners, where it is admitted the rule is applicable. It further appears the contracting party in that case had express authority to enter into the contract in question.

Conclusion.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals for the First Circuit in reversing the judgment of the United States District Court was error and conflicts with the decisions of the Supreme Judi-

cial Court of Massachusetts on important questions of local law, and that the issues involved should be determined by this Court.

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